UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 19 CR 374 (JMF)

MICHAEL AVENATTI,

Defendant.

----------x

New York, N.Y.
January 13, 2021
9:30 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: ROBERT SOBELMAN
MATTHEW D. PODOLSKY
ANDREW ROHRBACH
Assistant United States Attorneys

FEDERAL DEFENDERS OF NEW YORK
Attorneys for Defendant
BY: ROBERT M. BAUM
ANDREW J. DALACK
TAMARA L. GIWA

(Case called)

THE DEPUTY CLERK: Counsel, please state your name for the record.

MR. PODOLSKY: Good morning, your Honor.

Andrew Rohrbach, Robert Sobelman, and Matthew Podolsky for the government.

THE COURT: Good morning.

MR. BAUM: Good morning, your Honor.

Robert Baum on behalf of Mr. Avenatti, who is on the phone for this conference, and joined by co-counsel Andrew Dalack and Tamara Giwa.

THE COURT: Good morning to you all.

Mr. Avenatti, are you on?

THE DEFENDANT: Good morning, and I appreciate the court allowing me to participate by phone.

THE COURT: No worries. Safe travels when you make your way here.

I have found that it is most effective if counsel remain seated since we're masked and speak directly into the microphone. Particularly since Mr. Avenatti is listening in by phone, it is all the more important to make sure you speak directly into the microphone.

Just housekeeping matter with respect to Mr. Avenatti's absence. There was no request for him to participate in the jury questionnaire portion by phone. I'm

not sure we even have the means to do that. I assume he is waiving his presence after this proceeding when we go across the street.

That is correct, Mr. Baum?

MR. BAUM: That is correct, your Honor.

THE COURT: Can you make sure you speak into the microphone.

MR. BAUM: That is correct, your Honor.

THE COURT: All right. Thank you.

Can I confirm with the government that you have delivered the jury questionnaires?

MR. ROEBER: Yes, your Honor, we have delivered the questionnaires.

THE COURT: Terrific. I think what my plan is -- actually, I have a bunch that I would like to cover this morning. I am hoping we will get a heads-up from the jury department when they are ready for us. If so, I think what we will do is basically reconvene downstairs at the exit on Pearl Street and walk over across the street together.

And just a reminder, as discussed, it is the government's responsibility to retrieve the completed questionnaires at the end of this morning's proceeding and to make electronic scanned copies for both sides and for me. I assume that will be done later today and as expeditiously as possible.

I would think that the file names should correspond to the juror numbers, but I'm happy to leave that to you all to discuss with one another and figure out if there is a preferred way of handling that.

I'll direct the government to return the original copies of the questionnaires to me, to my staff, no later than the final pretrial conference on Tuesday.

There are two motions that are fully briefed and under advisement. The government's motion, motions in limine, and the government's motion to preclude the testimony of Mr. Vilfer. Time permitting, I am prepared to address all of them now. Let's just see how far we get. If we get cut off, one option would be to reconvene here after my remarks across the street are done, or I can pick up where we leave off at the final pretrial conference on Tuesday. Having said that, let's try to do what we can.

Let me start with the motion to preclude the testimony of Mr. Vilfer. I'm not sure that it is outcome determinative, but it does seem to me whether the government intends to offer evidence of the WhatsApp communications from the defendant's iCloud account, as opposed to the screenshots and/or PDF obtained from victim one, is highly material to the motion. I think the reply comes pretty close to clearly stating that the government intends to offer the evidence from the iCloud account, but it's a little bit less clear than I would have

thought or liked.

I just wanted to unambiguously ask the government, is that the plan?

How do you plan to present the WhatsApp messages?

MR. ROHRBACH: That is the plan, your Honor. We intend to present the WhatsApp messages evidence from the iCloud account rather than from victim one's cell phone.

THE COURT: OK. In other words, you don't plan to introduce the screenshots or the PDF at all?

MR. ROHRBACH: That's correct, your Honor.

THE COURT: All right. In light of that, the motion is granted, on the grounds that Mr. Vilfer's testimony is irrelevant, putting aside whether it would have been admissible otherwise, it is simply not relevant given the source of the evidence that the government plans to offer. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591 (1993) (noting that expert testimony must be "sufficiently tied to the facts of the case" in order to "aid the jury in resolving a factual dispute" to satisfy the fit requirement).

MR. DALACK: Your Honor, at the risk, I understand your Honor just ruled. I was hoping we would have an opportunity to address that particular point with the government's decision to introduce the messages from the iCloud account as opposed to the photographs that were taken of the complainant's telephone.

Also, we raised in our opposition to that motion to preclude additional argument about why Mr. Vilfer's testimony would, nevertheless, be relevant and satisfy the strictures of 702, notwithstanding the introduction of the communications from the iCloud.

I wish to make sure the record is complete on those points.

THE COURT: The record is complete, and I'll continue with my ruling.

To the extent that the evidence has any probative value, it is substantially outweighed by the dangers of unfair prejudice, confusion, waste of time, substantially for the reasons stated by the government in its initial letter motion and in reply. Accordingly, the motion is granted.

I will say, even if the government were planning to introduce the charts and PDF, I think I would still grant the motion. Number one, the testimony doesn't fit the facts of the case. There has been no suggestion, given at any stage, let alone that the messages are inauthentic and doesn't account for the fact that the defendant has always had or long had access to forensic copies of the messages in his own iCloud account. For that reason, it fails to the fit test. Moreover, I agree with the government that the proposed testimony runs afoul of the well-established propositions supported by the case, many cases cited by the government in its reply, including

United States v. Saldarriaga, 204 F.3d 50, 52-53 (2d Cir. 2000). The government has no duty to employ in the course of a single investigation all of the many weapons at its disposal, and the failure to utilize some particular technique or techniques does not tend to show the defendant not guilty with the crime he has been charged. Cases on which defendant relies -- including Kyles, Bowden, and Lindsey -- are inapposite for the reasons stated by the government and by, among others, Judge Nathan in the Maxwell case. All those cases arose in a very different context, namely the Brady context and on habeas -- and all involved very different facts. Were there any doubt on that score, it is resolved by the Second Circuit's decision in Watson v. Greene, 640 F.3d 501 (2d Cir. 2011), which observed -- in footnote 11 on page five12 -- that "Kyles provides no guidance about what evidence must be admitted at trial or what lines of questioning must be permitted to ensure a meaningful opportunity to cross-examine adverse witnesses."

In short, the testimony is not relevant or helpful with respect to anything the jury will be asked to do or can consider and thus is inadmissible. In addition, as I stated, it fails the Rule 403 balancing test, substantially for the reasons stated on pages four and five of the government's reply letter brief. The bottom line is, I think it would -- not think, it would create a side show, giving rise to a mini-trial

regarding best practices and requiring testimony and instructions about what the government can and cannot do, including Fourth Amendment limitations on seizing and mirroring a civilian's electronic devices, and so on. It would also be contrary to the instructions that I will give to the jury that the government is not on trial here and has no duty to imply any particular investigative techniques.

The bottom line is that any minimal relevance and probative value to the evidence is substantially outweighed by the dangers of unfair prejudice to the government, confusion of the issues, misleading the jury, and waste of time.

Accordingly, the government's motion is granted.

Turning to the motions in limine, let me quickly address the four motions that are not seriously in dispute. Starting with the fourth motion to preclude evidence and argument that victims of defendant's alleged scheme are to blame for having acted negligently or gullibly. That motion is granted. Insofar as the government's motion sought relief with respect to not only victim one, but to others (including, for example, victim one's literary agent and publisher), I agree that the defendant's opposition doesn't entirely moot the issue, but nor does he oppose the broader relief. For that reason, it is granted as unopposed. And in any event, it is amicably justified for the reasons stated in the government's opening brief. Accordingly, that motion is granted.

I do have one question, by the way, which is there any reason to continue referring to her as victim one? Her name is in the record, which including in the very questionnaire today. It just seems like the game is up at this point.

MR. ROHRBACH: If I may have a moment to confer with my colleagues, your Honor?

(Counsel confer)

Your Honor, if the court would like to use her name, that's fine with the government. We don't take issue with that.

THE COURT: I will make my decision on the fly and keep you in suspense.

A fifth motion is to provide argument that the defendant lacked the intent to defraud because he intended to repay the victim. As the parties agree, the issue is moot given that agreement.

The sixth motion is to preclude evidence or argument concerning the potential punishment or consequences of conviction. That motion is granted. It is not enough for the defense to promise, as it does, that it won't make reference to the "specific consequences or punishments" that Mr. Avenatti may face. That is the opposition brief at ECF number 187 at 23. To state in the opening or closing that Mr. Avenatti's "liberty is at stake," as the defense proposes to do, is to make a not-so-thinly-veiled reference to the prospect of

incarceration, which is altogether improper. Mr. Avenatti is certainly free to say something to the effect, that the case is important to him or that his fate or future is in the jury's hands. I mean, something of that nature. But anything that adverts to possible punishments, including possibility of incarceration, however obliquely, is improper and will not be permitted. Accordingly, the government's sixth motion in limine is granted.

The seventh is to preclude evidence or argument concerning the defendant's prior good acts or failure to commit other bad acts.

Seems to be an agreement that, as a general matter, the defendant may not offer evidence of prior good acts or failure to commit other bad acts. But beyond that, the record is insufficient for me to rule on the issue because I don't know what the defendant proposes to offer or whether he will offer anything on this score and under what exception or argument he would offer it. He makes reference to a couple different possibilities in his oppositions. So I just don't think I can give an advanced ruling on that. Accordingly, the motion is denied without prejudice to specific objections at trial.

That said, I'm inclined to agree with the government's suggestion at footnote seven of its reply, which is ECF number 197, that the defendant should be required to provide notice

and confer with the government before offering any specific purported acts, or anything of the sort that is covered by this motion, to ensure that the government can raise the issue in a timely fashion and in advance.

Any objection to that, Mr. Baum?

MR. BAUM: Judge, there may be issues brought out in cross-examination of witnesses. If that's the case, I don't see how -- I mean, I don't want to say there is no objection to that. The government may open the door and in direct examination may intend to call Mr. Avenatti's office manager. I don't know what degree they will inquire about Mr. Avenatti's work. There is also the issues yet to be determined about the government going into the financial -- his financial resources and his firm's financial resources.

So these may engender some discussion about Mr. Avenatti's work in the past. We have no intention on our direct case, unless Mr. Avenatti testifies, to bring out these issues.

THE COURT: All right. So, listen, I recognize that and you're certainly allowed some latitude with respect to your cross-examinations. Let me make a couple things clear.

One, if the government opens the door, the government opens the door, if you think they have opened the door. However, I want you to bring that to my attention so I can give you a ruling on whether I agree.

Number two, I will say that you may not offer any affirmative evidence as part of your case in chief of this sort unless you confer with the government first, and if there is an objection raised, raise it with me?

Number three, I would ask you to, I would say, exercise the rule of reason. If you can, and if you can anticipate you intend to offer evidence of this sort on cross or go into it on cross and you think that it might trigger an objection and it would be helpful for me to address it in advance outside the hearing of the jury, I think you should try to raise it with the government.

Having said that, I recognize that it is not always easy to anticipate the course of cross, and if there is a question here or there, I'll deal with objections as they come up.

Understood?

MR. BAUM: That's satisfactory, Judge.

THE COURT: I do want to be clear, however, this case is not whether Mr. Avenatti is a good lawyer or a bad lawyer, successful lawyer, unsuccessful lawyer. With the caveat that I'll rule on the pending motion about his financial condition. That is not what this case is about.

This case is about whether he committed the crimes charged in the indictment, and that's what the evidence will focus on. And if it is relevant to that, then it will come in.

if it's not, we're not going to go down a sideshow about whether he's a good person, a bad person, good lawyer or bad lawyer, so on and so forth. All right.

All right. That leaves the first three issues raised by the government in its motion in limine, one of which I had told you to be prepared to focus on today, namely the government's motion to admit evidence regarding the defendant's failure to file income taxes for the relevant time period.

Let me start with that issue first. That is to say it's the third motion in limine. First, bracketing the advice-of-counsel issue for a moment, I'm inclined to think that the government has the better of the argument, that defendant's sole argument in response is to the government's motion that there is nothing to indicate that, had he filed tax returns for the years in question, he would have been required to specify the sources of his income at the granular client level. That may be so. I think that is so.

But if the government were seeking to introduce tax returns that Mr. Avenatti did file, I would think that that might well be an argument to keep them out. In that situation, the government would have to be able to show that the income that is at issue was not included in whatever income the defendant reported; absent the ability to do that, the tax returns wouldn't be relevant or probative of the crimes charged.

But that is not the situation here. Here, the defendant, as I understand it, did not file tax returns at all and that fact does seem relevant and probative to me of whether the proceeds at issue here were, in fact, legitimate proceeds. That if the proceeds were lawful, legitimate proceeds to which Mr. Avenatti was entitled, they would have presumably been income and he would have been required to report them to the IRS. The fact that he did not do so tends to rebut any claim that they were lawful and legitimate. Of course, he may well have had other reasons not to file tax returns. And, again, I'm bracketing the advice-of-counsel issue for the moment. But that strikes me as argument to be made to the jury and/or fodder for cross-examination -- and ultimately I would think goes to the weight and not admissibility.

In support of that analysis and conclusion, I would cite several cases. First is United States v. Atuana, 816 F.App'x 592, 595 (2d Cir. 2020)(which affirms a district court decision to admit evidence that the defendant had failed to file income tax statements for business entities he controlled, which had been used as conduits in the fraudulent activity at issue" and noted that "the district court reasonably concluded that Atuana's failure to file any tax returns for his several companies over the course of the conspiracy was probative of whether the businesses were legitimate.")

Second is United States v. Mitchell, 613 F.3d 862, 866

(8th Cir. 2010)(which affirmed the district court's decision in the money laundering conspiracy case, to admit evidence of a failure to file tax returns as "relevant to show a plan to conceal the transactions" and noting that "failure to file tax returns is relevant to the existence of, and a defendant's participation in, a money laundering conspiracy.")

Finally, United States v. Memoli, 2014 WL 5313707, at *9 (D.Conn., October 16, 2014)(which admitted evidence of the "defendant's failure to file federal income taxes" for two years to "show consciousness under 404(b)(2)," accepting the government's argument that "defendant's failure to file taxes, and his accompanying failure to declare the extortion payments he received ... as income, is relevant admissible evidence that tends to show defendant's motive, intent, and knowledge that those payments were derived from criminal activity and thus needed to be concealed," and noting that "defendant did not refute the government's argument" about relevance, for instance, "by asserting that defendant had a legitimate reason not to file tax returns, for example, because he did not have any reportable income for those years."

So, again, bracketing the advice-of-counsel issue for a moment, I am inclined to think that putting that issue aside, that the government has the better of the argument.

Whoever is addressing this, what am I missing there?

MR. DALACK: Thank you, Judge.

I think the problem is, as your Honor pointed out, had we been dealing with actual tax returns filed, there would have been nothing in them for him to specify which client account particular income came.

THE COURT: Keep your voice up and speak into the microphone.

MR. DALACK: There would have been no requirement compelling him to specify from which client any income came. So the failure to file tax returns at all doesn't really speak to anything about the sources of income that he obtained and doesn't really allow the jury to infer anything about whether the income at issue in this case was obtained fraudulently or not, or whether he obtained it for some other purpose, perhaps, to reimburse for costs, which I'm not a tax specialist or a tax lawyer, but query whether any sort of reimbursement for costs would have had to have been filed formally in the context of a tax return.

So, on that score, whatever limited probative value the failure to file tax returns has is substantially outweighed by the risk of prejudice and confusing the issues. This case is not a tax fraud case. It is not about whether Mr. Avenatti properly or improperly declared income to the United States government. It is whether or not he had a culpable state of mind when he transferred funds from the trust account to his firm's account, and for whatever reason that was income for

reimbursement. That is the crux of the case. It is not about what happened afterwards or what happened with respect to the firm.

I think it is also difficult here, and with the understanding that the court is interested in bracketing off the advice-of-counsel issue, I'll set that aside for a second. It is important to note as well, and I acknowledge that we didn't mention this specifically in our papers in opposition to the government's motion, but it is our understanding that in February of 2019, Mr. Avenatti's firm was put into a receivership. So there is an actual factual impact. He did not have filed tax returns for the year 2019. He didn't have access to the information. It was in receivership at that point.

So on that additional ground, we think that when you look at the 403 balancing test, whatever minimal relevance the failure to file tax returns has is, again, substantially outweighed by the risk of prejudice to Mr. Avenatti. The jury could infer his guilt as to the charges, which are pretty much divorced from the failure to file tax returns simply on the ground that, well, he didn't file tax returns, so he must have been up to something. We don't think that that is a fair inference on balance given all of the information available.

Then when you couple that with the fact that we can confidently say Mr. Avenatti was acting under the advice of

counsel. We are going to have a sort of mini-trial of sorts to determine whether the advice-of-counsel defense and the standards we set forth in our opposition can be met. That would be a waste of time and confuse the issues and be very confusing to the jury.

For all those reasons, we think the government's motion should be denied.

THE DEFENDANT: Your Honor, this is Mr. Avenatti.

THE COURT: Mr. Avenatti, your counsel is doing an ample job on your behalf. Please let them speak.

THE DEFENDANT: I just needed to communicate with my lawyer, if I had an opportunity. That's all.

THE COURT: Do you have a means to do that?

MR. DALACK: I do, your Honor. It might require me to step out of the courtroom, if that's OK.

THE COURT: All right. Why don't you give Mr. Dalack access to the jury room and a couple minutes, and I'll give him an opportunity to confer with his client.

MR. DALACK: Thank you, Judge.

(Recess)

Thank you, your Honor. I would also be remiss if I failed to make the observation that at the time that at least the tax returns with respect to 2018 were due, it's undisputed that Mr. Avenatti was under indictment at that time, and that there was a Fifth Amendment concern that sort of dovetails with

the advice-of-counsel issue.

THE COURT: OK. Understood.

Again, I think I would like to bracket the advice-of-counsel issue and include in that the receivership issue, because I think they are sort of a similar nature and focus for a moment on the issue in the absence of those.

As I understand it, the defense that Mr. Avenatti is presenting is that he was entitled by virtue of an agreement with Ms. Clifford -- and I've made my decision on that score -- to keep a portion of the money that she was receiving as a book advance. If that is the case, it seems to me that it would be reportable income and that the failure to file any tax returns at all -- again, bracketing the receivership issue and Fifth Amendment issues and advice-of-counsel -- that it would be reportable income and that the absence or failure to file any tax returns would, therefore, be relevant and probative for the reasons I described.

I just don't see, I don't understand, it seems to me that the fact that he wouldn't have had to itemize it had he filed taxes is irrelevant to that issue. It's the failure to file that and the failure to report any income combined with the fact that this would clearly qualify as income, that would make it probative and relevant.

Am I missing something there?

MR. DALACK: Your Honor, I don't think you're missing

something there. I would push back. And, again, tax law is not my expertise, but this is not a tax fraud case. Whether or not the money that was kept from the book advance was kept for the purposes of income as opposed to reimbursement, I think could affect what would have been filed on any tax return with respect to that money and how the firm handled it.

But I think what I'm struggling with, you know, notwithstanding the court's desire to bracket off the other issues, is that the other issues do heavily weigh in our favor when it comes to the balancing test under 403.

THE COURT: Since I bracket those, I don't want you to go into them.

All right. Let me say that bracketing those issues, I think the evidence would clearly be admissible for the reasons I described. That is to say, strikes me that it is clearly income, or at least an argument could be made and you're entitled to argue otherwise to the jury, that it is relevant and probative for the reasons I described and not substantially outweighed by any danger of prejudice. It's not especially inflammatory relevant to the crimes charged, so on and so forth.

Having said that, the Fifth Amendment issue, the advice-of-counsel issue, and the receivership issue certainly do change the picture somewhat. And if those things are valid and an argument for why he didn't file tax returns, then it may

well tip the balance. I don't quite understand why somebody who is under indictment or a microscope of multiple investigations would not file tax returns. That seems to be just digging a deeper hole and raising a separate issue that the government could come after someone for.

So I don't quite understand the theory there or why counsel would have given that advice. Can you make a proffer with respect to the advice of counsel here?

MR. DALACK: It's hard to disentangle it with respect to this case, because when I say that Mr. Avenatti was under indictment, he was under indictment at the time of 2019 in at least three separate cases, or at least two separate cases, including the California case, which included tax charges.

Without, at this particular moment, getting into the propriety of an advice-of-counsel defense, I can say that as a reasonably experienced defense attorney myself, I would advise myself, faces tax charges, not making any representations or facing indictment, on Fifth Amendment grounds. I think that sort of resolves the issue here.

Perhaps had the government charged everything in one indictment, we might be in a different position. But it still remains the case, at least with respect to the California charges that were not the subject of the mistrial, he is still facing tax fraud charges in that case. So there wasn't anything on its face that is improper about advising him to not

make any sworn representations about his finances, given the position that the government has taken about those finances and about the propriety of his firm's dealings.

THE COURT: OK. Can you make a proffer about who advised him of that, when they advised him of that, and on what grounds?

MR. DALACK: I can make a proffer. I do know who the attorney is that advised him to not file the tax returns. My understanding is that it is Mr. Steward, James Steward, and he advised him not to file tax returns on a number of different grounds, but largely on Fifth Amendment grounds, your Honor.

THE COURT: Is the government not entitled to disclosure of the evidence that would support an advice-of-counsel defense?

I recognize it is not the charged crime here, but to the extent that I think it would otherwise be admissible, I think the government is entitled to know the basis on which you're arguing it's inadmissible and to challenge that, if they think that there is no valid advice-of-counsel defense.

MR. DALACK: I'm sorry. Your Honor, I think I would respectfully like an opportunity to write on that particular issue with respect to what kind of affirmative disclosures we would have to make in the first instance before advancing an advice-of-counsel defense. We think it touches on thorny privilege issues. I want an opportunity --

THE COURT: Mr. Dalack, if you're raising an advice-of-counsel defense, you are waiving the privilege. There is no privilege because you're relying on the advice of counsel.

MR. DALACK: Understood, your Honor. I think the issue is that it's disentangling whether or not we are advancing advice-of-counsel charges as opposed to something -- we're not making, obviously, an advice-of-counsel defense with respect to the charges in this case. We are advancing and saying that there is a viable advice-of-counsel defense as to a particular piece of evidence that the government is seeking to introduce. I don't know if those trigger the same kinds of affirmative disclosure obligations in the first instance.

I would like an opportunity to take a look at the law on that issue and see to what extent the government would even be entitled to that before we sort of cross that bridge in the middle of trial.

Can I have one minute, your Honor?

THE COURT: Yes.

(Counsel confer)

MR. DALACK: Mr. Baum alerted me to another issue, which is if, in fact, we had to go down this road and affirmatively call Mr. Steward to the stand to inquire about the propriety of his advice as to not to file tax returns, it would necessarily open the door to a discussion of the

California case.

THE COURT: Let me stop you. I'm inclined to think, although I haven't heard from the government, that if there is a valid advice-of-counsel defense here, that this isn't going to come in because then the 403 balancing probably does tip the other way for those reasons, among others. It just becomes a complete sideshow, and the dangers of unfair prejudice involved with revealing that Mr. Avenatti faced multiple indictments and so on and so forth are just, you know, quite clear.

Let me put it this way. I think the government is entitled to test your assertion, and if it doesn't think that there is a valid defense to challenge it and if I need to hold a hearing outside the presence of the jury to determine whether it is valid to then determine whether the evidence comes in without any discussion of that, I'm prepared to do that.

Just, at the end of the day, candidly, I'm not sure this evidence is so powerful that the government wants to go down that road and buy the risks that come along with it. That being said, I need to decide the issues that I need to decide.

Anyway, let me turn to the government and see your thoughts on this, how you think we should proceed, what sort of disclosure you would look for, how you want to address the receivership issue and the Fifth Amendment issues. I would think the Fifth Amendment issues are tied up with the advice-of-counsel issue, and in that sense, they are not really

separable.

In any event, government?

MR. ROHRBACH: The government agrees with that last proposition, that the Fifth Amendment issue is tied up with the advice-of-counsel issue. We agree that the Fifth Amendment issue is tied up with the advice-of-counsel issue. On the advice-of-counsel issue, our view is what the court expected. If there is a valid advice-of-counsel defense here, I think the government would walk away from this evidence rather than try to introduce it and open the door to the sideshow that the defense is discussing.

But the government should have an opportunity to test whether that advice-of-counsel defense is real, whether Mr. Avenatti, in fact, received the kind of advice that we're talking about. The defense's assertion of privilege here is an attempt to use privilege as a sword to keep out the government's evidence and a shield to protect them, protect the actual content of advice on which Mr. Avenatti relied, which is improper.

So the government's suggestion here is that the defense provide discovery to the government about the basis for the advice on which Mr. Avenatti allegedly relied upon review of that evidence. The government may decide not to proceed with the tax evidence or we may ask for further relief or opportunity to discuss it with the court again.

THE COURT: All right.

MR. DALACK: I'm a little --

THE COURT: My proposal is the following. I'm inclined to agree with that, but certainly prepared to give you an opportunity, if you think that there is a basis to avoid disclosure, to persuade me of that.

What I propose is that I set a deadline of Monday for the defense to disclose whatever evidence it has or any information that would support advice-of-counsel with respect to this issue, and then that you be prepared to address it on Tuesday either substantively or procedurally with respect to how you propose we proceed, whether it needs to be briefed, whether the government is walking away, so on and so forth.

To that end, I think you guys should confer before that conference on Tuesday to see if you can reach some agreements on that score. In the meantime, if the defense think that's there is a basis to withhold the information on privileged grounds or otherwise, you can submit a letter brief to me, and I will certainly consider it. And if I agree, then I'll deviate from what I just said. If I disagree, that's the plan.

Any objection?

MR. DALACK: Well, I guess I'm having a difficult time understanding exactly what more the government wants beyond the proffer that we have made here today with respect to the advice

of counsel. We have named the attorney who we are saying gave Mr. Avenatti that advice. I'm not sure, beyond that information, do they want details as to the exact advice given?

I guess I'm having a hard time understanding the scope of what the government desires, and we feel we have made a fulsome enough proffer to allow the issue to be resolved on balancing grounds, assuming that Mr. Avenatti -- and we're saying he was advised my Mr. Steward not to file tax returns for a number of reasons, but primarily on Fifth Amendment grounds, and given the pending charges out in another district.

THE COURT: Well, I don't want to speak for the government. I think the best course here is for them to confer with you and tell you what sorts of things they are looking for. At a minimum, I would think that if there were any communications regarding this issue, part of the advice-of-counsel defense requires a showing that the defendant disclosed all relevant information to counsel and also what the advice was.

If the advice was given in writing, they are entitled to see what the advice was and when it was given. If there is a record of the dates on which that advice was given, I think they are entitled to that. I think they are entitled to more than simply the name of the person and the bottom-line advice given. But I think the best course is to leave it to you to confer later today and see if you can reach agreement on that.

If you have any disagreements, you are certainly available to try and resolve them. And, again, if you want to persuade me that you don't have to disclose anything beyond what you already disclosed, certainly make an effort.

I would think there is a clear waiver, if you're putting forward advice-of-counsel as a basis to avoid the admission of evidence against your client.

All right. Anything else on that score?

MR. ROHRBACH: Just one thing from the government, your Honor. We ask the deadline be Monday at noon, since the conference is Tuesday at noon. I think we have more than just Monday at midnight to Tuesday at noon to review and confer with the defense.

THE COURT: All right. I'll set it as Monday and three p.m. How about that?

MR. DALACK: I'm sorry. That's Monday at three p.m. for any disclosures to the government or our letter to the court about both?

THE COURT: Any disclosures, unless sometime before then I grant you relief from having to do that. It is incumbent on you to get me a brief on that sooner rather than later why you think there is a basis to it. Otherwise, at three p.m. on Monday, you are to disclose whatever evidence supports the defense.

MR. DALACK: I anticipate being in touch with one of

the three of them over the weekend too. There will be many opportunities to discuss this.

THE COURT: I would imagine.

All right. I should note, I guess, on Tuesday we can take it up, but to the extent that the evidence does ultimately come in, I would also think that it is an appropriate issue to have a limiting instruction on. I think putting the cart before the horse asking you that you should propose something now. Let's first figure out if it's coming in. If it does come in and the defense requests a limiting instruction, I would be inclined to give one. You should certainly give that some thought. Confer with one another and make a proposal if and when it is appropriate.

All right. Since I think we have some additional time, let me turn to the other two issues on the table. Actually, before I do that, can I also just clarify if this evidence, the tax return evidence were to come in, how the government -- what it would be?

Would it be through a witness, through stipulation?

MR. ROHRBACH: We would confer with the defense about a stipulation, but the government's plan otherwise is to call someone from the Internal Revenue Service to give very brief testimony just explaining the absence of tax filing for those two years and relevant entity. We think, extremely brief, from the government's perspective, subject to cross and along the

lines the defense has been talking about.

THE COURT: That's why I asked, just because if there are arguments to be made or cross-examination that may have some bearing on the issues.

All right. Let's turn to the first issue in the motions in limine, namely the request to admit evidence regarding the disposition of criminal proceeds.

Let me start with a question for the government. What is the evidence?

You say you don't want to introduce evidence of Mr. Avenatti's spending habits generally, but you don't actually give me any details on what the actual use of the funds here was and how you propose to prove it up.

MR. ROHRBACH: If I may have a minute to confer with my colleagues, your Honor?

(Counsel confer)

Your Honor, the government would offer a law enforcement witness who would explain a tracing analysis showing where the funds went. They went to various entities, including Avenatti & Associates, as well as from there on to other entities or other individuals. And then the government would also offer some brief testimony from the office assistant, who would just describe what some of those entities are, if they are not facially apparent from the bank records that the law enforcement officer would be testifying about.

So there might be, for instance, some of the money went to pay payroll for Mr. Avenatti's other entities, and that is something that the office assistant would be able to elaborate on.

THE COURT: OK. As I understand it, there is no intention to prove, sort of, that he paid for some expensive coat or alcohol or dinners at some fancy restaurant. I mean, something that would sort of veer into the territory of living a high-flying life. I mean, it sounds like it is much more just showing that it was converted to his own use.

MR. ROHRBACH: It is much more like that, your Honor. But one of the items of his own use is, I think, the thing that is most in the vein of what your Honor is describing are payments for a Ferrari.

THE COURT: For a Ferrari?

MR. ROHRBACH: Yes, your Honor.

THE COURT: Is there a need to say that it is a Ferrari as opposed to just paying for a car?

(Counsel confer)

MR. ROHRBACH: Yes. I think what we're struggling with, your Honor, is the records show a payment to a Ferrari financial entity. So that is the way we are able to describe where the payment went and show that it wasn't for the benefit of victim one.

If the defense were to stipulate it went to a car

dealership, we won't draw an objection. If we just make that point that it was for his car, that would be sufficient for the government, and we could omit the word Ferrari.

THE COURT: All right.

MR. DALACK: If I may, Judge?

THE COURT: Yes.

MR. DALACK: First, the government is seeking to introduce this information to show lavish lifestyle evidence that we think is improper, not only going to show it with respect to the Ferrari, also going to show it with respect to a private jet.

I think the point that I would like to emphasize is, according to the government's theory of the case and indeed according to the case law, whatever wire fraud that allegedly took place was complete the moment that the money was moved from the trust account to Eagan Avenatti. Whatever happened afterwards is immaterial.

Just as it would be inappropriate for us to say, well, Mr. Avenatti spent this money helping Syrian refugees as a defense to the charges, it is similarly improper for the government to say, look how he spent this money afterwards. If the money was obtained properly, it doesn't matter what Mr. Avenatti spent it on.

THE COURT: I got the argument. You make that in your briefs. I totally get it.

MR. ROHRBACH: I do want to say, Mr. Dalack is right there are payments made to a company that is responsible for Mr. Avenatti's private jet, which we would like to introduce. If there is a way we can do that without revealing the fact that Mr. Avenatti had a private jet, we would be amenable to do so.

THE COURT: OK. So let me rule on the motion before me, which is generally with respect to this kind of evidence.

The motion is granted, as to say the government may introduce evidence regarding the disposition of criminal proceeds subject to specific objections to particular evidence, and I'll get more into that in a moment.

As the government's brief opening brief notes, evidence showing how a defendant spent the proceeds of his crime is routinely admitted as relevant evidence to establish the defendant's motive and intent for committing the crime. See pages four and five of the government's brief, which is ECF number 176, for relevant citations. More specifically, I agree with the government that the proffered evidence is (1) direct evidence of the defendant's scheme to defraud; (2) proof that he controlled the disposition of the fraud proceeds; and (3) evidence of the defendant's motive and intent to commit the charged crimes.

In arguing otherwise, the principal contention made in the briefs, and repeated by Mr. Dalack a moment ago, is that

evidence of what Mr. Avenatti did with the money is not an element of the crimes charged. But that is certainly true, but of course that is not the test for relevance under Rule 401. See, for example, United States v. Quattrone, 441 F.3d 153, 188 (2d Cir. 2006)("So long as a chain of inferences leads the trier of fact to conclude that the proffered submission effect as the mix of material information, the evidence cannot be excluded at the threshold relevance inquiry.")

United States v. Redcorn, 528 F.3d 727 (10th Cir. 2008), the sole case on which the defendant relies, does not suggest otherwise.

For one thing, it is obviously from a different circuit and, therefore, not binding. But in any event, Redcorn did not address the issue here, the relevance and admissibility of evidence concerning the disposition of criminal proceeds. Instead, the question in Redcorn was whether certain wire transfers could be used to satisfy the elements of the crime. The court held that they could not because, at the time of those wire transfers, the crime had already been completed. See page 739. That is a totally different issue from the one here of admissibility.

Finally, and not for nothing, the evidence in Redcorn was unnecessary even to prove conversion to the defendant's use because the funds at issue had already been converted by being transferred into the defendant's accounts. Here, because the

defendant was authorized or alleged authorized to receive the funds on behalf of Ms. Clifford, the government has to show more to prove that he converted them to his own use. That more is evidence that he spent the funds on himself.

Finally, assuming for the moment that none of the specific expenditures are inflammatory or could give rise to undue prejudice, that is to say assuming there is a narrow scope of the evidence that the government seeks to offer, and I'm inclined to keep it narrow, that is the government does not seek to offer evidence of Mr. Avenatti's spending habits generally, the Rule 403 balancing test would plainly not call for wholesale exclusion. That is the evidence is highly probative of the crimes charged and given that it is not particularly inflammatory, and certainly no more inflammatory than the charges, the probative value is not substantially outweighed by the Rule 403 dangers, that is as to the evidence generally.

Having said that, I am not sure that is true with respect to an expenditure on a Ferrari or expenditure on a private jet. It just isn't clear to me that the government needs to prove those if it has other proof of expenditures that are personal to Mr. Avenatti. Those make the point, and there is probably no need to get into expenditures that might simply raise the specter of unfair prejudice in front of the jury.

I would like you guys to confer about what the

expenditures are that the government proposes to prove. I would urge the government to consider, just excluding those on the theory that you can make the arguments based solely on the other expenditures, if for some reason the government concludes that it can't, I would urge you to consider whether there is a way to sanitize it to say that it is a car dealership or transportation expenses related to Mr. Avenatti that would omit the potentially inflammatory details that we're talking about, a Ferrari and private jet. But I will hear if there is a dispute about it. I'm prepared to hear about it, and you should raise it on Tuesday.

Again, as a general matter, the government's evidence is granted, but it is subject to rulings on the particulars if there is any dispute between the parties. On this issue, I'm not sure that a limiting instruction would be necessary, but if the defense requests one, I'll certainly consider it. And you should confer with one another in advance, in the event that the defense does request one.

Since I haven't heard that they are ready for us across the street, I will plow ahead and turn to the last issue on the agenda, which is the second motion in limine, motion to admit evidence regarding the defendant's and his law firm's financial circumstances.

One question of clarification for the defense. In your opposition brief you quote from what I think is an

analysis from a Mr. Drum that was prepared in connection with the Central District of California case. Am I correct in inferring from that and from the brief more generally that you have that analysis and that it was disclosed to you?

MR. DALACK: We were referencing an analysis that was on the record. We do not have all the analyses from Mr. Drum, your Honor. That is part of the problem. We have asked for it. We subpoenaed it. It has not yet been received. So that's also an issue that remains from what I understand in dispute in the Central District of California.

While I have the microphone for a second, your Honor, I want to raise an issue that bars on the court's consideration of this particular motion in limine.

THE COURT: Slowly, and go ahead.

MR. DALACK: Yes, Judge.

There is a Rule 16 issue here that's aside from the servers for a moment and the information contained on the servers and the information and analysis conducted by Mr. Drum. For the first time ever, despite having represented on a number of occasions that Rule 16 discovery was complete, the government disclosed to us yesterday, or maybe two days ago, Rule 16 material that they labeled as Rule 16 material from a prospective government witness. That's Sean Macias. It is about 303 pages of communications between Mr. Macias and Mr. Avenatti that should have absolutely been disclosed by the

Rule 16 deadline in this case.

In its discovery letter, the government dropped a footnote to indicate that these materials were previously disclosed to other counsel in connection with 19 CR 373. That is completely a red herring and inapposite. Regardless, whether the government disclosed it to other counsel in the separate case has no bearing on the government's obligation to disclose that information in this case, particularly because one, it involves Mr. Avenatti's own written recorded statements that are plainly discoverable under Rule 16, and two, because it discloses records that are in the possession of the government witness that we understand they intend to call on this financial condition issue.

So as the court is aware, there are a number of remedies available to the court to rectify a Rule 16 violation. One of them is adjournment. Another is to preclude the evidence or preclude the testimony. And we're going to ask for both. We want the court to consider this Rule 16 violation in the context of the government's application to affirmatively introduce evidence of Mr. Avenatti's condition and preclude them from getting it in on that basis. We want the court to strike and prevent Mr. Macias from testifying because they did not produce Rule 16 materials relevant to his testimony.

And third, your Honor, again, we would ask for an adjournment in light of the belated Rule 16 discovery request

and its impact on our investigation and our ability to prepare adequately for Mr. Macias' anticipated testimony, which we understand will focus primarily on Mr. Avenatti's financial condition and that of his firm.

THE COURT: Can you tell me what the 303 pages consist of?

What is in the 303 pages?

MR. DALACK: A lot of communications between Mr. Avenatti and Mr. Macias concerning various aspects of Mr. Avenatti's financial condition and his firm's financial condition. I'm still reviewing them, your Honor, and going over them. We received a voluminous set of 3500 material as well that we're still digesting.

To receive that kind of a Rule 16 production on the eve of trial, what appears to be a crucial government witness, is completely uncalled for.

THE COURT: All right. Mr. Dalack, we are 11 days prior to the beginning of the actual trial. 303 pages hardly seems like an especially voluminous set of materials. If they are just communications between your client and another witness, putting aside the fact that your client was involved in them and presumably, therefore, aware of them, I just find it unfathomable that you can't be prepared to go to trial in 11 days.

What am I missing?

MR. DALACK: It's not so much about the actual number of the pages, but it is the content of them and the fact it should have been disclosed to us months ago.

THE COURT: And what is the content of them that requires you to have more than 11 days to prepare before you begin this trial?

That's what I'm asking you. If you're asking an adjournment, what is the basis for that request?

Because it seems like a transparent attempt to get something that you have previously asked and been denied, and it doesn't seem to be at all grounded in reality.

My question is: What is there about these materials that requires more than 11 days to prepare?

MR. DALACK: There are individuals that are also referenced in the communications. Again, a substantial amount of the Rule 16 discovery pertaining to Mr. Macias contains communications between Mr. Macias and others about Mr. Avenatti and also between Mr. Avenatti and Mr. Macias. It will require time for us to go through and figure out if we want to interview any of those people, potentially call them as defense witnesses to rebut what Mr. Macias might say, or to put on an affirmative defense case.

I'm still going through it, Judge. And respectfully, it is not a transparent attempt to get adjournment for some flimsy reason. We are very concerned about it, particularly

because it appears both based on the 3500 from Mr. Macias and the Rule 16 discovery, that they are going to rely on him heavily to advance their argument by a financial condition.

And we think that it further tips the scale in our favor with respect to the court's taking one of a number of remedies, either restricting the government's ability to introduce evidence of financial condition, precluding Mr. Macias from testifying, or granting adjournment.

THE COURT: All right. Mr. Podolsky, is this your issue?

MR. PODOLSKY: I'll address this, your Honor.

Honestly, I don't want to give this more air than it needs, but just to provide the actual facts here.

As an initial matter, Mr. Macias is not going to be offered to testify generally about the defendant's financial condition or provide some form of analysis about it. His testimony will be significantly limited to a loan that the defendant procured at a particularly relevant time in this case. It will be quite short testimony.

The second thing I'll say is that the defense is right --

THE COURT: Can I stop you there for a moment?

MR. PODOLSKY: Yes.

THE COURT: What is the loan and what relevance does it have to the issue in this case?

MR. PODOLSKY: Yes, your Honor.

I think the evidence will show, this is clear from the 3500 and I think the defense is well aware that in order to repay the first -- well, the second of the four book payments, but the first payment that we allege Mr. Avenatti stole before the victim detected it, Mr. Avenatti went to, quite desperately, to find a loan. Mr. Macias has direct testimony to provide about the defendant's efforts to get a personal loan, the proceeds of which went to repay essentially to provide a cashier's check to Ms. Clifford that was represented by the defendant to be the book proceeds.

So it is probative, directly relevant, and it is not so much about the defendant's financial condition generally, although certainly there will be implications about that, given the need for a loan. It is about a directly relevant fact in the sequence of Mr. Avenatti's scheme. That is what it is about.

In preparing for trial, we noticed through inadvertence that a set of e-mails and text messages involving Mr. Macias that had been produced in the prior case, his 3500, by the way, had been produced as well, the content of the testimony has been made known to the defendant for years now. We realize simply by inadvertence, I accept the representation that it was maybe 300 pages, hadn't been transferred over to production in this case as well.

In less than 24 hours of realizing it, we produced those materials. The content of them, your Honor asked, is mostly irrelevant e-mails and text messages. Most of those pages, frankly, are defendant messages that show pictures of people at dinner, have no relevance to this case, and not going to be an exhibit in this case.

I would say it took me about 30 minutes to go through these pages when we realized we hadn't produced them, and we have already marked as potential exhibits, which are being produced today I think, probably five pages or less of these exhibits that actually may be offered at trial.

So the bottom line is the defense has received 3500 in this case, received the same 3500 two years ago. The defendant, I should say, not this defense counsel. We have produced the 300 largely relevant pages which, as I say, took about 30 minutes to review. We don't see any basis for adjournment or any other relief here. This, frankly, simply is what it is like to prepare for trial, and the defense is well aware of what the testimony will be and certainly prepared, has plenty of time to prepare for it.

THE COURT: And did Mr. Macias -- if that is how it is pronounced -- did he testify in the Judge Gardephe trial?

MR. PODOLSKY: He has not testified before in the prior trial against Mr. Avenatti in this district. My understanding from speaking to him is he did not testify in the

California trial against Mr. Avenatti either. We did, though, beyond our obligations and in an abundance of caution, provide his 3500 in advance of the prior trial in this district so the defendant did have it, despite the fact that he is not a testifying witness in that case.

THE COURT: All right. Mr. Dalack?

MR. DALACK: Yes. I don't think the court should credit the government's argument that because it previously produced these materials to counsel in another case that it should somehow cure the failure to produce.

THE COURT: Mr. Dalack, it's not just a counsel in the other case. It is to the defendant. The defendant is also a relevant party here, and if it was disclosed in his own prior case, he has had them. On top of which, again, he was party to these communications, so he surely knows what is in them. So I don't quite understand the argument.

MR. DALACK: The significance, your Honor, is that at the time, from what I understand, at the time that the materials pertaining to Mr. Macias were disclosed to the defense and, perhaps, Mr. Avenatti in the other case, he was incarcerated in solitary confinement at the MCC on 10 South. So I think that is also a circumstance that I want the court to consider.

Again, it's frankly frustrating for the government to, on the one hand, say, you know, this Rule 16 violation is no

big deal because the defendant had it or should have had in it in connection with the other case. And it was the government's decision to move on three separate indictments and to charge him in three separate cases. If the government wanted the convenience of making one single production across numerous charges, it could have proceeded differently. They opted not to, now we are at a disadvantage.

THE COURT: All right. It sure seems to me, based on what both sides have said, that this is making a mountain out of a molehill. I firmly agree that the government should have turned over what it doesn't dispute is Rule 16 material in a more timely fashion, but I also know that it is not uncommon, as lawyers prepare for trial, they discover that certain things were inadvertently not turned over. As long as they promptly cure that and it doesn't cause prejudice, it is what it is.

I am certainly not persuaded, based on what I had heard, there is any prejudice, certainly no prejudice that would warrant a delay of trial. 11 days until you start trial. This is a marginal issue in a trial. 303 pages is not a lot. Even if you need to speak to witnesses based on those communications, you have 11 days to do it. There is absolutely zero basis, as far as I can tell, to adjourn this trial on that basis.

If the defense wants to make an application to preclude the exhibits that the government has marked from this

set of documents and if those haven't already been disclosed -- I think today is the deadline for the government to provide that to the defense -- I'll certainly entertain that motion. I'm skeptical because, again, I don't really see what the prejudice is. But if you want to make the motion, you're entitled to make the motion and I will take it under consideration.

With respect to the motion that is correctly before me and fully submitted, namely the motion to admit evidence regarding the defendant's and his law firm's financial circumstances, that motion is granted subject to specific objections to particular evidence at trial. There are scores of cases in this circuit holding that evidence of financial motivation is relevant and admissible in fraud cases. See, for example, United States v. Moses, 2021 WL 4558137, at *2 (W.D.N.Y. October 6, 2021)(citing cases, as well as the cases cited by the government on pages seven through nine of its opening brief).

In his opposition, defendant contends that motive is distinct from intent and not an element of the offenses. That is true, but a non sequitur. Again, it ignores the broad definition of relevance under Rule 401.

Second, the defendant contends that motive has no bearing on the circumstances of this case, but that is not true. As the government argues at page four of its reply

brief, this is ECF number 197, it is critical that the jury be provided with the contempt of the defendant's motive in order to properly assess his conduct and intent; absent such a context, I think the jury would be left with a misleading impression that there was little or no reason for the defendant to commit the crimes charged. The defendant is obviously free to argue to the jury that his financial condition did not provide a motive for the crimes here, but that argument does not call for exclusion of the evidence.

Finally, defendant, once again, invokes the discovery issues that arose in the Central District of California case, and, obviously, the one that Mr. Dalack just raised here. With respect to that issue, that is Mr. Macias, I don't think that that provides a basis to exclude this evidence generally. Again, it may provide a basis to exclude the actual communications that were just disclosed, and I'll reserve judgment on that pending motion, if there is one, but it certainly doesn't change my calculus, analysis, or conclusion with respect to the government's first motion in limine.

With respect to the Central District of California case, I do not think that those issues have any bearing here. As I noted in my order with respect to the defendant's request for adjournment at ECF number 213, the defendant has had the servers, and at least to some extent the Drum analysis, certainly the bottom line of it, for approximately four months.

Given the nature of the charges in this case, the defendant's own familiarity with the underlying evidence, and his own familiarity with his own and his law firm's financial condition and the tools available to him to review the servers and other evidence that is ample time to make use of the evidence, and there is simply no argument, no compelling argument to be made about delayed disclosure in this case.

To the extent that defendant speculates in his brief that there may be other materials in the Central District of California U.S. Attorney's office, files that have not been turned over, that argument is without merit here.

First, it is pure speculation.

Second, I am inclined to agree with the government, but will not rule definitively on the issue that the Central District of California U.S. Attorney's office is not part of the prosecution team for purposes of this case or at least with respect to purposes of this issue in this case.

Third, whether it is or not, the defendant conspicuously does not allege any discovery violations in this case, aside from the Mr. Macias issue just raised.

And, finally, with the exception, perhaps, of the Mr. Macias issue, since that was based on a disclosure that was just made, any such motion would be untimely under Rule 12(b)(3)(e) and (c). Accordingly, the motion is granted. Again, that is subject to specific objections at trial.

Moreover, I would encourage the parties to confer in an effort to streamline the evidence, perhaps through stipulations, as the government seems to invite in footnote two of its opening brief.

Yes, Mr. Dalack. Hold on. I should warn you, I'm told that we should begin to make our way across the street in a couple minutes. I'm nearing the conclusion of what I have to cover, but just wanted to give you a heads-up, we will promptly decamp to the other courthouse to proceed.

MR. DALACK: Thank you, Judge. I'll be very brief. We have one other quick matter to cover, too.

The issue that we flagged is not just materials that are in the possession of the Central District of California, but the servers were in the possession of main justice. And we want to make --

THE COURT: Mr. Dalack, I find this totally uncompelling. I understand that Mr. Avenatti got a mistrial in the Central District of California case, and it is not for me to opine whether that was right or wrong. Judge Selna is an excellent judge. Not my case.

MR. DALACK: Understood.

THE COURT: Bottom line, there is no issue in this case. He had the servers four months at this point, and the limited information that may be on them that is relevant to this case is clearly accessible, presumably known to him. It

is a nonissue. It is making something out of nothing, so I don't want to hear about it again.

MR. DALACK: Yes, your Honor.

There is two subpoenas that are currently pending to the trustee for Eagan Avenatti, the bankruptcy trustee. We subpoenaed information from the trustee. The government subpoenaed information from the trustee. I just wish to alert the court to the fact that, late last night, we received an e-mail, counsel for the government and I, from the attorney representing the bankruptcy trustee in that case who represented that it was likely unlikely that we would get any return on the subpoena in time for the January 24 trial date.

THE COURT: OK. Duly noted.

On this last issue, once again, I am not inclined to think that a limiting instruction is particularly necessary. But, once again, if the defense has a request, disagrees, I am certainly willing to consider it, and you should confer with one another if that is the case.

Before we decamp across the street, anything else to discuss from either side, from the government?

MR. ROHRBACH: The government has three very brief housekeeping matters, your Honor.

THE COURT: Can they wait until Tuesday?

Do they need to be taken up today?

MR. ROHRBACH: They need to be dealt with, but they

are extremely brief, your Honor.

THE COURT: Go for it, but not too quickly that the court reporter will get mad at me.

MR. ROHRBACH: We will be extremely brief.

The first is just how the court would like the electronic copies of the jury questionnaires today. We are producing them to the defense through a file sharing site USAfx. We can add someone from the court to that site as well so the court could have access.

THE COURT: I think we've gotten things through that means ourselves. Talk to my chambers about that. I think that would suffice.

MR. ROHRBACH: OK. Second, the filing deadline for motions to quash the defense subpoenas to the office assistant is five o'clock today. We understand that the office assistant is going to file a motion at five o'clock, and so the government would ask permission to file any supplemental motion by midnight today, since our motion may depend on what the office assistant says. We will, of course, make an effort not to be redundant with any arguments the office assistant is making. We want to see what the office assistant says in her motion before we file any additional briefing on the subject.

THE COURT: I'll give you until 11 p.m. tonight.

Next.

MR. ROHRBACH: Thank you, your Honor.

Last issue is just that we are working to resolve the issue about video testimony for office assistant one. So we wanted to flag for the court that the earlier the parties are aware of which courtroom in which the trial will be held, the faster we'll be able to make arrangements. We would like to do an in-person test well before trial to facilitate.

THE COURT: That issue is an open issue. I'll be prepared to address it more on Tuesday. Right now, we have courtroom 318. But I've been advised that it may not be possible to have more than 15 jurors in courtroom 318. I would love to have more than 15 jurors, given what is going on in the world at the moment. I'm exploring whether there is another courtroom available that would accommodate more.

I'm trying to nail that down, and I will be able to speak to it on Tuesday, and certainly give you as much notice as I can that I think would provide ample opportunity to run whatever tests you need to test. I definitely want you to test it to make sure that it is working.

MR. ROHRBACH: Thank you, your Honor.

Nothing further.

THE COURT: Anything from the defense before we --

MS. GIWA: Briefly on one issue related, in fact, to the office assistant. Yes, your Honor.

THE COURT: Very quickly.

MS. GIWA: As to the last point that the government

raised, I share the concern about the technology. So I would just ask to be included in the test run that they have with the witness.

THE COURT: I think that was contemplated, but I agree, you should be.

MS. GIWA: I just wanted to confirm that.

Your Honor, the other issue is with respect to your Honor's ruling about the Rule 15 issue. Certainly, we understand the court's ruling in allowing two-way video. We understand also that that ruling relied on Second Circuit precedent. We just want to clarify one issue.

In footnote three of your Honor's --

THE COURT: This sounds like an issue that we can table until Tuesday. Any reason we need to take it up now?

MS. GIWA: No, your Honor, although I think I can make it briefly.

THE COURT: I'm sorry.

MS. GIWA: I think I can address it briefly. I'm also happy to wait until Tuesday.

THE COURT: Let's wait until Tuesday. I just want to wrap up and get downstairs so we don't keep folks waiting across the street.

But definitely raise it Tuesday. I'm not precluding you from bringing it up, I just don't want to do it now.

Next Tuesday we will be in courtroom 318 in this

building at 11:15. Again, I'll be able to speak at that time, I hope I'll be able to speak at that time as to where trial will be, but that's where we'll be.

One issue I do want to just flag for you to think about between now and Tuesday, because I want to hear from you about it on Tuesday, whether I can and should ask the jurors as part of the oral voir dire whether they are fully vaccinated and/or boosted. I would be inclined to do so.

For one thing, if I were a lawyer, I think I would want to know the answer to that question. It might have bearing on my peremptory challenges. Putting that aside, if the jury ends up being fully vaccinated, if I were on the jury, I think I would want to know that and inclined to share that information with them.

Third, depending on the court's protocols throughout trial, it may affect or have bearing on seating and the jury box and how much distance they need to maintain from each other and so forth.

I'm reserving judgment on the question. I'm thinking about it myself. I wanted to flag it as something you should think about and be prepared to address on Tuesday.

With that, let's reconvene by the exit of Pearl Street in the lower lobby, and I'll see you there in the next few minutes.

Thank you very much.

(Recess)

(Venire present)

THE COURT: You may be seated, in case you're in another room and couldn't hear me.

Good morning and happy new year, everyone. Welcome to the United States District Court for the Southern District of New York. My name is Jessie Furman. I am a United States District Judge here in this district, and I will be the judge presiding over this matter.

Let me start by thanking you for being here. Jury service is one of the most important duties of citizenship and our system of justice depends on citizens who are willing to meet their civic responsibilities. And so while I know that this may not be the most convenient time for some of you to be here, and this may not be the place you would most like to be, your presence is important and we are grateful to all of you for being here.

Your commitment is especially commendable in light of the ongoing COVID-19 pandemic. This court has been in continuous operation for 232 years, through several wars, the flu pandemic of 1918, the Great Depression, the attack of September 11, 2001, just to name a few national crises. As it does through those events, the court has continued to operate through the present pandemic, thanks to the tireless efforts of the court staff, some of whom have helped you here this

morning. That is because the wheels of justice must continue to turn. Jury trials are an essential part of that wheel and can happen only if people like you show up to do your civic duty. So I am profoundly grateful for your service during these challenges times.

Following the advice of medical expert, we have adopted COVID protocols that have enabled us to safely conduct trials throughout most of the pandemic. Indeed, since September 2020, so for about 15 months, the court has safely operated and conducted more than 100 jury trials, including several since the recent Omicron surge began.

We have taken and will continue to take every appropriate precaution to ensure your safety. For example, everyone entering the building must complete an electronic questionnaire. Our witnesses will testify from a plexiglass partitioned witness box with a HEPA filter, and lawyers will conduct examinations from a similarly equipped podium. Everyone else, including me, is required to wear an N95, KN95, or KN94 face mask, and to maintain social distancing at all times. We have re-outfitted large courtrooms to be used in place of regular jury rooms, to allow for distancing during your jury breaks and deliberations. In short, we have endeavored to think through every relevant detail, and other COVID protocols have proven effective in dozens and dozens of trials, again, over 100, during the last 15 months.

We are here to begin the selection of a jury for a criminal case entitled United States v. Michael Avenatti. Our purpose, as I am sure you know, is to make sure that we have a jury of citizens who will decide the issues in this case both fairly and impartially, and without any bias or prejudice in favor of, or against, either side; and who will decide the case based only on the evidence that is presented in the court during the trial.

As of this moment, you are all potential jurors in this case, and until you are relieved of your duties in connection with this case, until you are excused formally from jury duty, you must follow all of the rules of conduct for jurors, many of which I will discuss with you in the next few minutes.

The jury selection process is being conducted in two phases. Today, you will provide your sworn answers to questions on a written questionnaire. It is absolutely essential that you answer all of the questions truthfully, and that you answer them truthfully, accurately, and completely. For one thing, you will be under oath when you answer the questions. That is, the answers you give on the questionnaire will be given under penalty of perjury. For another, your questions will play -- I'm sorry. Your answers will play an important part in selecting the jury for this case and will help make the process of picking the jury more efficient and

fair. The more careful and thorough you are in making sure that all of your answers are truthful and complete, the faster this process is likely to go, which is good for you and for good for all the trial participants.

After you finish filling out the questionnaires today, they will be collected so that they can be reviewed by the parties and by me. You will then be done for today. Many of you, however, will be asked to return for phase two of the jury selection process, which will involve in-person questioning by me beginning either next Thursday, January 20, or next Friday, January 21, at 8:30 in the morning. I will give you further instructions and you'll receive further instructions about how to find out if you are required to return next Thursday or Friday and where you should go on those days.

The trial in this case is expected to take up to three or possibly four weeks after jury selection is completed, meaning that it should end no later than Friday, February 18, and may well end before that. In part, for your convenience, I have chosen to follow a growing trend in this courthouse by keeping shorter, more compact trial days. Once we have selected a jury, we will begin each morning at nine a.m. and we will end each day by three p.m., with one and only one half-hour break in the middle of the day. I want to stress, though, that this is the schedule only after we have picked and seated a jury, which is to say that next Thursday or Friday, if

you are asked to return, you should be prepared to be here for the full day.

I will now give you some information about the nature of the case, go over some of the important rules of conduct that you must follow, and conclude with a few more words about the questionnaire that you will fill out today. Keep in mind that everything I say is not evidence and that you may not use it if you are ultimately called to be a juror in this case; it is just meant to give you an idea of what the case is about to help you complete the questionnaire truthfully and accurately.

As I mentioned, this is a criminal case. The charges against Michael Avenatti are set forth in an indictment. An indictment is a formal method of accusing a defendant of a crime. It is not evidence of any kind; it merely states what crimes the government intends to prove that the defendant committed. It is the government's burden to establish a defendant's guilt beyond a reasonable doubt. I will instruct the jury on what this burden of proof means after the evidence at trial is presented.

Mr. Avenatti has pleaded not guilty to the charges in the indictment. That is, he has denied the charges made by the government. The accusations, and the defendant's denial of these accusations, raise issues of fact that must be decided by a jury on the basis of evidence that will be presented in court. Unless and until the government proves the defendant's

guilt by competent evidence beyond a reasonable doubt, the defendant is presumed to be innocent of the charges contained in the indictment.

Let me give you a brief summary of those charges so that you have some sense of what it is about as we go through jury selection. As I told you a moment ago, however, nothing I say is evidence.

Mr. Avenatti is charged in the indictment with two crimes -- referred to as counts. Count One charges that Mr. Avenatti devised a scheme to defraud his client, Stephanie Clifford, who is also known as Stormy Daniels, by taking for himself payments due to Ms. Clifford pursuant to a book contract. The government further alleges that Mr. Avenatti falsely represented to Ms. Clifford that the payment has not been made. Count Two charges that Mr. Avenatti used Ms. Clifford's identity -- specifically, her name and signature -- without her permission, namely on a document in which he allegedly falsely represented to Ms. Clifford's book agent that Ms. Clifford had given authorization for the payments to be sent by wire to an account controlled by Mr. Avenatti.

As I noted, Mr. Avenatti has pleaded not guilty to both charges and denies these allegations. Mr. Avenatti is presumed innocent and that presumption of innocence continues unless and until a jury determines that the government has

proved every element of a crime charged beyond a reasonable doubt.

During the course of trial, each side will present evidence to support its claims. The function of the jury is to decide questions of fact. You who are chosen as jurors will be the only judges of the facts, and nothing that the court, that is me, or the parties say or do may in any way intrude on your role as the exclusive fact-finders based only on the evidence presented. When it comes to the law, as distinguished from the facts, however, you must take your instructions from me, from the court, and you are bound by these instructions. You may not substitute your own ideas of what the law is or what you think it should be. At the conclusion of the case, your job will be to determine whether the government has proved the defendant's guilt beyond a reasonable doubt.

Your decisions as a juror must also be made solely on the basis of the evidence presented in court. Because of this, unless and until you are formally excused as a juror, you should not attempt to gather any information on your own relating to the case or anyone involved in it again until you are formally excused. After today, you may come back next Thursday or Friday. During that time, these instructions apply to you and it is critical that you follow them. So that includes me, that is to say you must not attempt to gather any information about me, about the defendant, about the lawyers in

the case, about any other names that you hear about today, about anything relating to this case. Do not engage in any outside reading about the case, do not use the Internet (including Google, Facebook, Twitter, any other social media website that you may use, any search engine you may use,) do not use anything to learn about this case or anyone involved in the case. Put simply, do not try to obtain information from any source outside of the confines of the courtroom.

This case arises out of activities that may have been covered by the media. The trial itself may be covered by the media and people may talk about it. From this moment on, you as jurors must not pay any attention to outside information or commentary about this case, whether it is in the newspapers, on TV or radio, or on the Internet. If you see an article somewhere, do not read it. If you have the TV on and you suddenly hear something about the case, turn it off. All right? You must ignore even the comments and opinions of your family and friends. Nor may you discuss the case, or anyone or anything having to do with it, with anyone else, including your family members and your potential fellow jurors, until I have discharged you as a juror or a potential juror in this case.

This means that you must not speak to anyone directly or by telephone, text message, the Internet, social networking sites, social media sites, or any tool of technology about the case or anyone or anything having to do with it. You must not

read or listen to anything about this case from any source. You must not allow anyone to speak to you about this case. If you are approached by anyone to speak about it, politely tell them that the judge has directed you not to do so, and do not remain in the presence of anyone who may be discussing the case.

The attorneys for both sides are here today, but I will formally introduce them and Mr. Avenatti to you when we return next week for the second phase of the selection procedures. They, members of their teams, and the witnesses, everyone involved in this case, have been instructed not to speak with you outside of the courtroom, even to offer a friendly greeting. So if you happen to see any of them outside of whatever room you're currently in or outside of whatever room you come back to next week, that is any room outside of the trial courtroom, they will not and should not speak to you. They will not hold the door open for you, they will not give you a greeting, they will not smile at you. Do not be offended by this. They will only be acting properly and following my instructions. The reason for all of these rules is quite simple. The parties are entitled to have you render a verdict in this case on the basis of your independent evaluation of the evidence presented in the courtroom -- and only that evidence. Obviously, communicating with others about the case, including your family, friends, or social networking contacts, before you

deliberate with your fellow jurors at the end of the trial, or exposing yourself to information about the case outside of the courtroom, would compromise your service and fairness as a juror. I thank you in advance for taking these duties serious and responsibilities seriously and for obeying my instructions in every respect.

Finally, I have some instructions and other information with respect to the questionnaire that you will be completing today.

As I said a few minutes ago, the purpose of the questionnaire is to provide information to me and to the parties to assist us in determining whether you can be a fair and impartial jurors in this case. The questionnaire will ask you to provide certain information -- information about your personal background, your family, some of your beliefs and attitudes about certain matters, how you are employed and so forth.

You should understand that these questions are not intended to pry into your lives, but to make sure that we select fair and impartial jurors who can listen to the evidence with an open mind and decide the issues in this case based only on the sworn testimony given in the courtroom, on whatever exhibits may be received in evidence, and on my instructions as to the law. The selection of such a jury is our sole goal at this point.

To help ensure the selection of a fair and impartial jury, you must, as I said before and will say again, give true, complete, and detailed answers to the questions as you will shortly swear to do. To repeat, you will be completing this questionnaire under oath, under penalty of perjury, and you must answer each and every question truthfully and completely, and it is critical that you take the time and care you need to do so.

Please read all of the instructions and introductory information in the questionnaire carefully before you answer any of the questions. Read each question in full carefully before you write your answer. You are to write your juror number -- which you should have received as you came into the court this morning -- on the top of each page of the questionnaire. Again, whatever number you received, that is the number you should write on each page of the questionnaire. Where indicated for each question, please either circle yes or no, or as required, furnish answers, explanations, or details in the space provided. Do not write on the back of any page -- if you need additional space to complete any answer, there are additional pages at the end of the questionnaire that you may use to finish an answer.

Please do not leave the room that you are in while you are completing the questionnaire. If you must use the restroom, please raise your hand to alert a member of the jury

department staff, then hand the questionnaire to the staff member, wait for them to come, hand the questionnaire to that staff member, follow their directions and retrieve your questionnaire upon your return. Please do not discuss the questions or your answers with anyone, including your fellow prospective jurors.

In a moment, I will ask you to stand so that my deputy, Ms. Smallman, Alex Smallman, who is hiding behind the screen right here, can administer the oath to you. I will give her the microphone to do so. If you would prefer to affirm rather than swear, you are free to do so. She will ask you to either swear or affirm, and whatever your preference may be, you can do. In either case, you will then be under oath.

With that, I'll ask you to please stand so that Ms. Smallman can administer the oath.

(Venire sworn)

All right. Thank you very much.

Because I cannot say it too many times, let me repeat, you are now under oath and must answer all of the questions on the questionnaire truthfully. Take your time, make sure you read each question in full before you answer it, and then answer each question carefully.

Before I finish and leave, because I'm going to leave to allow you the time to complete the questionnaire, let me, once again, thank you on behalf of the parties and on behalf of

the court for your service today. In a minute, the parties, the lawyers and I are going to step out and representatives of the court will provide the questionnaires to you. As I said before, you are allowed to leave after your questionnaire has been completed and turned in, and to the extent that you need instructions, the jury department will give it to you.

The first page of the questionnaire has instructions for how to find out if you are required to return for in-person questioning either next Thursday, January 20, or next Friday, January 21. As it says on that sheet -- and you should keep that sheet -- you are required to call a number after six p.m. next Wednesday, January 19, for information on whether, when, and where you are required to return. Make sure that you remember your juror number and keep that information page with that phone number in a safe place so you know how to find out. You are not excused until you find out whether you are called upon to return or not, and if you are called upon to return, you must return to continue your jury service. You will need both your juror numbers and that information sheet as this process continues, so keep them in a safe place.

With that, the lawyers and I will now step out and allow you to complete the questionnaire. Again, please take your time and make sure your answers are truthful and accurate. I look forward to seeing some or many of you here next week. In the meantime, I hope you and your family stay safe and

healthy, and I wish you a wonderful day.

Thank you very much.

(Adjourned)